APPENDIX III

ASBESTOS DEMOLITION AND RENOVATION CIVIL PENALTY POLICY
Revised: May 5, 1992

The Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil judicial actions under Section 113 (b) of the Clean Air Act ("the Act"). In addition, the General Penalty Policy is used by the Agency in determining an appropriate penalty in administrative penalty actions brought under Section 113 (d)(1) of the Act. Due to certain unique aspects of asbestos demolition and renovation cases, this Appendix provides separate guidance for determining the gravity and economic benefit components of the penalty. Adjustment factors should be treated in accordance with the General Penalty Policy.

This Appendix is to be used for settlement purposes in civil judicial cases involving asbestos NESHAP demolition and renovation violations, but the Agency retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the Appendix is to be used in conjunction with the General Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. If the Region is referring a civil action under Section 113(b) against a demolition or renovation source, it should recommend a minimum civil penalty settlement amount in the referral. For administrative penalty cases under Section 113 (d)(1), the Region will plead the calculated penalty in its complaint. In both instances, consistent with the General Penalty Policy, the Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence, history of noncompliance,[1] ability to pay, and litigation risk.

The "gravity" component should account for statutory criteria such as the environmental harm resulting from the violation, the importance of the requirement to the regulatory

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[1] As discussed in the General Penalty Policy, history of noncompliance takes into account prior violations of all environmental statutes. In addition, the litigation team should consider the extent to which the gravity component has already been increased for prior violations by application of this Appendix.

scheme, the duration of the violation, and the size of the violator. Since asbestos is a hazardous air pollutant, the penalty policy generates an appropriately high gravity factor associated with substantive violations (i.e., failure to adhere to work practices or to prevent visible emissions from waste disposal). Also, since notification is essential to Agency enforcement, a notification violation may also warrant a high gravity component, except for minor violations as set forth in the chart for notification violations on page 15.

I. GRAVITY COMPONENT

The chart on pages 15-16 sets forth penalty amounts to be assessed for notification and waste shipment violations as part of the gravity component of the penalty settlement figure. The chart on page 17 sets forth a matrix for calculating penalties for work-practice, emission and other violations of the asbestos NESHAP.

A. Notice Violations

1. No Notice

The figures in the first line of the Notification and Waste Shipment Violations chart (pp. 15-16) apply as a general rule to failure to notify, including those situations in which substantive violations occurred and those instances in which EPA has been unable to determine if substantive violations occurred.

If EPA does not know whether substantive violations occurred, additional information, such as confirmation of the amount of asbestos in the facility obtained from owners, operators, or unsuccessful bidders, may be obtained by using section 114 requests for information or administrative subpoenas. If there has been a recent purchase of the facility, there may have been a pre-sale audit of environmental liabilities that might prove useful. Failure to respond to such a request should be assessed an additional penalty in accordance with the General Penalty Policy. The reduced amounts in the second line of the chart apply only if the Agency can conclude, from its own inspection, a State inspection, or other reliable information, that the source probably achieved compliance with all substantive requirements.

2. Late, Incomplete or Inaccurate Notice

Where notification is late, incomplete or inaccurate, the Region should use the figures in the chart, but has discretion to insert appropriate figures in circumstances not addressed in the matrix. The important factor is the impact the company's action has on the Agency's ability to monitor substantive compliance.

B. Work-Practice, Emission and Other Violations

Penalties for work-practice, emissions and other violations are based on the particular regulatory requirements violated. The figures on the chart (page 17) are for each day of documented violations, and each additional day of violation in the case of continuing violations. The total figure is the sum of the penalty assigned to a violation of each requirement. Apply the matrix for each distinct violation of sub-paragraphs of the regulation that would constitute a separate claim for relief if applicable (e.g., § 61.145(c)(6)(i), (ii), and (iii)).

The gravity component also depends on the amount of asbestos involved in the operation, which relates to the potential for environmental harm associated with improper removal and disposal. There are three categories based on the amount of asbestos, expressed in "units," a unit being the threshold for applicability of the substantive requirements.[2] If a job involves friable asbestos on pipes and other facility components, the amounts of linear feet and square feet should each be separately converted to units, and the numbers of units should be added together to arrive at a total. Where the only information on the amount of asbestos involved in a particular demolition or renovation is in cubic dimensions (volume), 35 cubic feet is the applicability limit which is specified in § 61.145(a)(1)(ii).

Where the facility has been reduced to rubble prior to the inspection, information on the amount of asbestos can be sought from the notice, the contract for removal or demolition, unsuccessful bidders, depositions of the owners and operators or maintenance personnel, or from blueprints if available. The Region may also make use of § 114 requests and § 307 subpoenas to gather information regarding the amount of asbestos at the facility. If the Region is unable to obtain specific information on the amount of asbestos involved at the site from the source, the Region should use the maximum unit range for which it has adequate evidence.

Where there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal or handling, the Region may calculate the number of units based upon the amount of asbestos reasonably related to such improper practice. For example, if improper

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[2] This applicability threshold is prescribed in 61.145(a)(1) as the combined amount of regulated-asbestos containing material (RACM) on at least 80 linear meters (260 linear feet) of pipes, or at least 15 square meters (160 square feet) on other facility components, or at least 1 cubic meter (35 cubic feet) off facility components.

removal is observed in one room of a facility, but it is apparent that the removal activities in the remainder of the facility are done in full compliance with the NESHAP, the Region may calculate the number of units for the room, rather than the entire facility.

C. Gravity Component Adjustments

1. Second and Subsequent Violations

Gravity components are adjusted based on whether the violation is a first, second, or subsequent (i.e., third, fourth, fifth, etc.) offense.[3] A "second" or "subsequent" violation should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated. This prior notification could range from simply an oral or written warning to the filing of a judicial enforcement action. Such prior notification of a violation is sufficient to trigger treatment of any future violations as second or subsequent violations; there is no need to have an admission or judicial determination of liability.

Violations should be treated as second or subsequent offenses only if the new violations occur at a different time and/or a different jobsite. Escalation of the penalty to the second or subsequent category should not occur within the context of a single demolition or renovation project unless the project is accomplished in distinct phases or is unusually long in duration. Escalation of the violation to the second or subsequent category is required, even if the first violation is deemed to be "minor".

A violation of a § 113(a) administrative order (AO) will generally be considered a "second violation" given the length of time usually taken before issuing an AO and should be assessed a separate penalty in accordance with the General Penalty Policy.

If the case involves multiple potential defendants and any one of them is involved in a second or subsequent offense, the penalty should be derived based on the second or subsequent offense. In such instance, the Government should try to get the prior-offending party to pay the extra penalties attributable to this factor. (See discussion below on apportionment of the penalty).

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[3] Continuing violations are treated differently than second or subsequent violations. See, Duration of Violation, below.

2. Duration of the Violation

The Region should enhance the gravity component of the penalty according to the chart (p. 17) to reflect the duration of the violation. Where the Region has evidence of the duration of a violation or can invoke the benefit of the presumption of continuing violation pursuant to Section 113(e)(2) of the Act, the gravity component of the penalty should be increased by the number of additional days of violation multiplied by the corresponding number on the chart.

In order for the presumption of continuing noncompliance to apply, the Act requires that the owner or operator has been notified of the violation by EPA or a state pollution control agency and that a prima facie showing can be made that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice. When these requirements have been met, the length of violation should include the date of notice and each day thereafter until the violator establishes the date upon which continuous compliance was achieved.

When there is evidence of an ongoing violation and facts do not indicate when compliance was achieved, presume the longest period of noncompliance for which there is any credible evidence and calculate the duration of the violation based on that date. This period should include any violations which occurred prior to the notification date if there is evidence to support such violations. However, if the violations are based upon the statutory presumption of continuing violation, only those dates after notification may be included. When the presumption of continuing noncompliance can be invoked and there is no evidence of compliance, the date of completion of the demolition or renovation should be used as the date of compliance.(U.S. v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013 (D.N.J. 1988))[4] Where there has been no compliance and the demolition or renovation activities are ongoing, the penalty should be calculated as of the date of the referral and revised upon a completion date or the date upon which correction of the violation occurs.

Successive violations exist at the same facility when there is evidence of violations on separate days, but no evidence (or presumption) that the violations were continuing during the

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[4] The court in Tzavah held that for purposes of asbestos NESHAP requirements, a demolition or renovation project has not been completed until the NESHAP has been complied with and all asbestos waste has been properly disposed. 696 F. Supp. at 1019.

intervening days. For example, where there has been more than one inspection and no evidence of a continuing violation, violations uncovered at each inspection should be calculated as separate successive violations. As discussed in Section C (1) above, successive violations occurring at a single demolition or renovation project will each be treated as first violations, unless they are initially treated as second or subsequent violations based upon a finding of prior violations at a different jobsite or because they warrant escalation based upon the fact that the current job is done in distinct phases or is unusually long in duration. The chart on page 16 reflects that additional days of violation for which there is inspection evidence are assessed the full substantive penalty amount while additional days based upon the presumption of continuing violation are assessed only ten percent of the substantive penalty per day.

Since asbestos projects are usually short-lived, any correction of substantive violations must be prompt to be effective. Therefore, EPA expects that work practice violations brought to the attention of an owner or operator will be corrected promptly, thus ending the presumption of continuing violation. This correction should not be a mitigating factor, rather this policy recognizes that the failure to promptly correct the environmental harm and the attendant human health risk implicitly increases the gravity of the violation. In particularly egregious cases the Region should consider enhancing the penalty based on the factors set forth in the General Penalty Policy.

3. Size of the Violator

An increase in the gravity component based upon the size of the violator's business should be calculated in accordance with the General Penalty Policy. Where there are multiple defendants, the Region has discretion to base the size of the violator calculation on any one or all of the defendants' assets. The Region may choose to use the size of the more culpable defendant if such determination is warranted by the facts of the case or it may choose to calculate each defendant's size separately and apportion this part of the penalty (see discussion of apportionment below).

II. ECONOMIC BENEFIT COMPONENT

This component is a measure of the economic benefit accruing to the operator (usually a contractor), the facility owner, or both, as a result of noncompliance with the asbestos regulations. Information on actual economic benefit should be used if available. It is difficult to determine actual economic benefit,

but a comparison of unsuccessful bids with the successful bid may provide an initial point of departure. A comparison of the operator's actual expenses with the contract price is another indicator. In the absence of reliable information regarding a defendant's actual expenses, the attached chart provides figures which may be used as a "rule of thumb" to determine the costs of stripping, removing, disposing of and handling asbestos in compliance with § 61.145(c) and §61.150. The figures are based on rough cost estimates of asbestos removal nationwide. If any portion of the job is done in compliance, the economic benefit should be based only on the asbestos improperly handled. It should be assumed, unless there is convincing evidence to the contrary, that all stripping, removal, disposal and handling was done improperly if such improper practices are observed by the inspector.

III. APPORTIONMENT OF THE PENALTY

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, more than one contractor and/or the facility owner will be named as defendants. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the multiple defendants can allocate among themselves as they wish. On the other hand, if one party is particularly deserving of punishment so as to deter future violations, separate settlements may ensure that the offending party pays the appropriate penalty.

It is not necessary in applying this penalty policy to allocate the economic benefit to each of the parties precisely. The total benefit accruing to the parties should be used for this component. Depending on the circumstances, the economic benefit may actually be split among the parties in any combination. For example, if the contractor charges the owner fair market value for compliance with asbestos removal requirements and fails to comply, the contractor has derived an economic benefit and the owner has not. If the contractor underbids because it does not factor in compliance with asbestos requirements, the facility owner has realized the full amount of the financial savings. (In such an instance, the contractor may have also received a benefit which is harder to quantify - obtaining the contract by virtue of the low bid.)

There are circumstances in which the Government may try to influence apportionment of the penalty. For example, if one party is a second offender, the Government may try to assure that such party pays the portion of the penalty attributable to the second offense. If one party is known to have realized all or most of the economic benefit, that party may be asked to pay for

that amount. Other circumstances may arise in which one party appears more culpable than others. We realize, however, that it may be impractical to dictate allocation of the penalties in negotiating a settlement with multiple defendants. The Government should therefore adopt a single "bottom line" sum for the case and should not reject a settlement which meets the bottom line because of the way the amount is apportioned.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the Government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or second offense), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. However, the Government should also be flexible enough to mitigate the penalty for cooperativeness in accordance with the General Penalty Policy. If a case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole should be sought from the remaining defendants. This remainder can be adjusted upward, in accordance with the general Civil Penalty Policy, if the circumstances warrant it. Of course, the case can also be litigated against the remaining defendants for the maximum attainable penalty. In order to assure that the full penalty amount can be collected from separate settlements, it is recommended that the litigation team use ABEL calculations, tax returns, audited financial statements and other reliable financial documents for all defendants prior to making settlement offers.

IV. OTHER CONSIDERATIONS

The policy seeks substantial penalties for substantive violations and repeat violations. Penalties should generally be sought for all violations which fit these categories. If a company knowingly violates the regulations, particularly if the violations are severe or the company has a prior history of violations, the Region should consider initiating a criminal enforcement action.

The best way to prevent future violations of notice and work practice requirements is to ensure that management procedures and training programs are in place to maintain compliance. Such injunctive relief, in the nature of environmental auditing and compliance certification or internal asbestos control programs, are desirable provisions to include in consent decrees settling asbestos violations.

V. EXAMPLES

Following are two examples of application of this policy[5].

Example 1: (This example illustrates calculations involving proof of continuing violations based on the inferences drawn from the evidence)

XYZ Associates hires America's Best Demolition Contractors to demolish a dilapidated abandoned building containing 1300 linear feet of pipe covered with friable asbestos, and 1600 square feet of siding and roofing sprayed with asbestos. Neither company notifies EPA or State officials prior to commencing demolition of the building on November 1. Tipped off by a citizen complaint, EPA inspects the site on November 5 and finds that the contractor has not been wetting the suspected asbestos removed from the building, in violation of 40 C.F.R. § 61.145(c)(3). In addition, the contractor has piled dry asbestos waste material on a plastic sheet in the work area pending its disposal, in violation of 40 C.F.R § 61.145(c)(6)(i). There is no evidence of any visible emissions from this pile. During the inspection, the site supervisor professes complete ignorance of asbestos NESHAP requirements. An employee tells the inspector that workers were never told the material on-site contained asbestos and states "since this job began we've just been scraping the pipe coverings off with our hammers." The inspector observes there is no water at the site. The inspector takes samples and sends them to an EPA approved lab which later confirms that the material is asbestos. Work is stopped until the next day when a water tank truck is brought to the facility for use in wetting during removal and storage.

On November 12 the inspector returns to the site only to find that the workers are dry stripping the siding and roofing because the water supply had been exhausted and the tank truck removed. A worker reports that the water supply had lasted four days before it ran out at the close of the November 9 work day. The inspector observes a new pile of dry asbestos containing debris in tall grass at the back of the property. Unlike the pile observed inside the facility during the first inspection, this pile is presumed to have produced visible emissions. At the time of the second inspection 75% of the asbestos had been removed from the building 50% of which is deemed to have been

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[5] The examples are intended to illustrate application of the civil penalty policy. For purposes of this policy, any criminal conduct that may be implied in the examples has been ignored. Of course, in appropriate cases, prosecution for criminal violations should be pursued through appropriate channels.

improperly removed[6]. After discussion with EPA officials, work is halted at the site and XYZ Associates hires another contractor to properly dispose of the asbestos wastes and to remove the remaining 25% of the asbestos in compliance with the asbestos NESHAP. The new contractor completes disposal of the illegal waste pile on November 18.

Neither XYZ Associates nor America's Best Demolition Contractors has ever been cited for asbestos violations by EPA or the State. Both companies have assets of approximately $5,000,000.00 and have sufficient resources to pay a substantial penalty.

The defendants committed the following violations: one violation of the notice provision (§ 61.145(b)(1)); one violation for failure to wet during stripping (§ 61.145(c)(3)) and failure to keep wet until disposal (§ 61.145(c)(6)(i)), each detected at the first inspection and lasting a duration of five days (Nov. 1-5); a second separate dry stripping violation (§ 61.145(c)(3)), observed at the second inspection and lasting for three days (Nov. 10-12); an improper disposal violation (§ 61.150(b)), discovered during the second inspection, lasting a duration of nine days (the violation began on November 10 and continued to November 18 per Tzavah) and a visible emissions violation (§61.150(a)) discovered during the second inspection, lasting a duration of seven days (Nov. 12-18). Thus, the defendants are liable for a statutory maximum of $750,000 (29 days of work practice violations x $25,000 (statutory maximum penalty per day of each separate substantive violation) + $25,000[7] for the notice violation = $750,000).

The penalty is computed as follows:

Gravity Component

Notice violation, § 61.145(b) (first time)	$15,000

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[6] America's Best completed 75% of the work over a 12 day period. For 4 of the 12 days (Nov.6-9) there is evidence that water was used and asbestos properly handled. Assume that equal amounts of asbestos were removed each day. Thus, 50% of the asbestos was properly removed (25% by America's Best, 25% by the new contractor.

[7] Arguably, for purposes of calculating the statutory maximum, the notice violation can be construed to have lasted at least until the EPA has actual notice of the demolition (or renovation, as the case may be).

-- First Inspection Violations		
Violation of § 61.145(c)(3) (10 + 5 = 15 units of asbestos) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 4 days of violations)	$ 4,000	
Violation of § 61.145(c)(6)(i) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 4 days of violations)	$ 4,000	
-- Second Inspection Violations		
New violation of § 61.145(c)(3) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 2 days of violations)	$ 2,000	
Violation of §61.150(a) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 6 days of violations)	$ 6,000	
Violation of § 61.150(b) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 8 days of violations)	$ 8,000	
	$109,000	
-- Size of Violator (size of both defendants combined)	$20,000	
Total Gravity Component		$129,000
Economic Benefit Component		
$20/sq. foot x 1600 sq. feet + $20/linear foot x 1300 linear feet	$32,000 + 26,000	
	$58,000	

$58,000 x 50% (% of asbestos improperly handled).	$ 29,000
Preliminary Deterrence Amount	$158,000
Adjustment factors - No adjustment for prompt correction of environmental problem because that is what the defendant is supposed to do.	
Minimum penalty settlement amount	$158,000

NOTE: If the statutory maximum had been smaller than this sum, then the minimum penalty would have to be adjusted accordingly. Also, for the dry stripping violations, no additional days were added for the period between the two inspections because there was no evidence that the dry stripping had continued in the interim period.

Example 2 (This example illustrates calculations involving proof of continuing violations based on the statutory inference drawn from the notice of violation)

Consolidated Conglomerates, Inc. hires Bert and Ernie's Trucking Company to demolish a building which contains 1,000 linear feet of friable asbestos on pipes. Neither party gives notice to EPA or to the state prior to commencement of demolition. An EPA inspector acting on a tip, visits the site on April 1, the first day of the building demolition. During the inspection he observes workers removing pipe coverings dry. Further inquiry reveals there is no water available on site. He also finds a large uncontained pile of what appears to be dry asbestos-containing waste material at the bottom of an embankment behind the building. He takes samples and issues an oral notice of violation citing to 40 C.F.R. §§ 61.145(c)(3) (dry removal), 61.145(c)(6)(i) (failure to keep wet until disposal), and 61.150(a) (visible emissions)[8], and gives the job supervisor a copy of the asbestos NESHAP. Test results confirm the samples contain a substantial percentage of asbestos.

On April 12, the inspector receives information from a

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[8] Regardless of whether the inspector observes emissions of asbestos during a site inspection, where there is circumstantial evidence (such as uncontained, dry asbestos piles outside), that supports a conclusion that visible emissions were present, the Region has discretion to include this violation.

reliable source that the pile of dry asbestos debris has not been properly disposed of and there is still no access to water at the facility. This information supports a new violation of §61.150(b) (improper disposal). The inspector revisits the site on April 22 and determines that the waste pile has been removed. A representative of Consolidated Conglomerates, Inc. gives the inspector documents showing that actual work at the demolition site concluded on April 17, but the contractor cannot document when the debris pile was removed. Thus, there are at least 61 days of violation (17 days of dry removal in violation of § 61.145(c)(3) 22 days of failure to keep wet until disposal in violation of §61.145(c)(6)(i), 11 days of visible emissions in violation of §61.150(a) and 11 days of improper disposal in violation of § 61.150(b)) times $25,000 per day, plus $25,000 for the notice violation[9], or a statutory maximum of $1,550,000.

Consolidated Conglomerates is a corporation with assets of over $100 million and annual sales in excess of $10 million. Bert and Ernie's Trucking is a limited partnership of two brothers who own tow trucks and have less than $25,000 worth of business each year. This contract was for $50,000. Bert and Ernie's was once previously cited by the State Department of Environmental Quality for violations of asbestos regulations. As a result, all violations are deemed to be second violations.

The penalty is computed as follows:

<u>Gravity Component</u>	
No notice (2nd violation)	$ 20,000
Violation of §61.145(c)(3) (approx. 3.85 units) (second violation)	$ 15,000
Additional days of violation (per presumption) (16 x $1,500)	$ 24,000
Violation of §61.145(c)(6)(i) (second violation)	$ 15,000
Additional days of violation (per presumption) (21 x $1,500)	$ 31,500
Violation of §61.150(a)	$ 15,000

[9] See footnote 3.

(second violation)		
Additional days of violation (per presumption) (10 x $1,500)	$ 15,000	
Violation of §61.150(b) (second violation)	$ 15,000	
Additional days of violation (per presumption) (10 x $1,500)	$ 15,000	
	$180,500	
Size of Violator (based on Bert and Ernie's size only)	$ 2,000	
Total Gravity Component	$182,500	
Economic Benefit Component		
$20/linear foot x 1,000 linear feet	$ 20,000	
Preliminary Deterrence Amount		$202,500
Adjustment factors - 10% increase for willfulness	$ 18,250	
Minimum Settlement Penalty Amount		$220,750

NOTE: Since this example assumes there was a proper factual basis for invoking the statutory presumption of continuing noncompliance, the duration of the §61.150(a) visible emissions and § 61.150(b) disposal violation runs to April 21 and the § 61.145(c)(3) dry removal violation runs to April 17, the longest periods for which noncompliance can be presumed.

Apportionment of the Penalty

The calculation of the gravity component of the penalty in this case reflects a $5,000 increase in the notice penalty and a $48,500 increase in the penalty for substantive violations because it involves a second violation by the contractor. Ordinarily, the Government should try to get Bert and Ernie's to pay at least these additional penalty amounts. However, Consolidated Conglomerate's financial size compared to the contractor's may dictate that Consolidated pay most of the penalty.

Notification and Waste Shipment Record Violations

Notification Violations	1st Violation	2nd Violation	Subsequent
No notice	$15,000	$20,000	$25,000
No notice but probable substantive compliance	$ 5,000	$15,000	$25,000

Late, Incomplete or Inaccurate notice.

For each notice, select the single largest dollar figure that applies from the following table. These violations are assessed a one-time penalty except for waste shipment vehicle marking which should be assessed a penalty per day of shipment. Add the dollar figures for each notice or waste shipment violation:

Notice submitted after asbestos removal completed tantamount to no notice.	$15,000
Notice lacks both job location and asbestos removal starting and completion dates.	4,000
Notice submitted while asbestos removal is in progress.	2,000
Notice lacks either job location or asbestos removal starting and completion dates.	2,000
Failure to update notice when amount of asbestos changes by at least 20%	2,000
Failure to provide telephone and written notice when start date changes	2,000
Notice lacks either asbestos removal starting or completion dates, but not both.	1,000
Amount of asbestos in notice is missing, improperly dimensioned, or for multiple facilities.	500
Notice lacks any other required information.	200
Notice submitted late, but still prior to asbestos removal starting date.	200

Waste Shipment Violations

Failure to maintain records which precludes discovery of waste disposal activity	2,000
Failure to maintain records but other information regarding waste disposal available	1,000
Failure to mark waste transport vehicles during loading and unloading (assess for each day of shipment)	1,000

Work-practice, Emission and Other Violations

Gravity Component

Total amount of asbestos involved in the operation	First violation	Each add. day of violation	Second violation	Each add. day of violation	Subsequent violations	Each add. day of violation
≤ 10 units	$ 5,000	$ 500	$15,000	$ 1,500	$25,000	$ 2,500
> 10 units but ≤ 50 units	$10,000	$ 1,000	$20,000	$ 2,000	$25,000	$ 2,500
> 50 units	$15,000	$ 1,500	$25,000	$ 2,500	$25,000	$ 2,500

Unit = 260 linear feet, 160 square feet or 35 cubic feet - if more than one is involved, convert each amount to units and add together

Apply matrix separately to each violation of §61.145(a) and each sub-paragraph of § 61.145(c) and § 61.150, except §61.150(d) (waste shipment records) which is treated as a one time violation and § 61.150(c) (vehicle marking) (see chart on pages 15-16); calculate additional days of violation, when applicable, for each sub-paragraph - add together

Benefit Component

For asbestos on pipes or other facility components:

$20 per linear, square or cubic foot of asbestos for any substantive violation.

CLEAN AIR ACT

STATIONARY SOURCE

CIVIL PENALTY POLICY

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CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY

I. INTRODUCTION

Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), provides the Administrator of EPA with the authority to commence a civil action against certain violators to recover a civil penalty of up to $25,000 per day per violation. Since July 8, 1980, EPA has sought the assessment of civil penalties for Clean Air Act violations under Section 113(b) based on the considerations listed in the statute and the guidance provided in the Civil Penalty Policy issued on that date.

On February 16, 1984, EPA issued the Policy on Civil Penalties (GM-21) and a Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). The Policy focuses on the general philosophy behind the penalty program. The Framework provides guidance to each program on how to develop medium-specific penalty policies. The Air Enforcement program followed the Policy and the Framework in drafting the Clean Air Act Stationary Source Civil Penalty Policy, which was issued on September 12, 1984, and revised March 25, 1987. This policy amends the March 25, 1987 revision, incorporating EPA's further experience in calculating and negotiating penalties. This guidance document governs only stationary source violations of the Clean Air Act. All violations of Title II of the Act are governed by separate guidance.

The Act was amended on November 15, 1990, providing the Administrator with the authority to issue administrative penalty orders in Section 113(d), 42 U.S.C. § 7413(d). These penalty orders may assess penalties of up to $25,000 per day of violation and are generally authorized in cases where the penalty sought is not over $200,000 and the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action. In an effort to provide consistent application of the Agency's civil penalty authorities, this penalty policy will serve as the civil penalty guidance used in calculating administrative penalties under Section 113(d) of the Act and will be used in calculating a minimum settlement amount in civil judicial cases brought under Section 113(b) of the Act.

In calculating the penalty amount which should be sought in an administrative complaint, the economic benefit of noncompliance and a gravity component should be calculated under this penalty policy using the most aggressive assumptions supportable. Pleadings will always include the full economy benefit component. As a general rule, the gravity component of the penalty plead in administrative complaints may not be mitigated. However, the gravity component portion of the plead penalty may be mitigated by up to ten per cent solely for degree of cooperation. Any mitigation for this factor must be justified under Section II.B.4.b. of this Policy. The total mitigation for good faith efforts to comply for purpose of

30%

determining a settlement amount may never exceed thirty per cent. Applicable adjustment factors which aggravate the penalty must be included in the amount plead in the administrative complaint. Where key financial or cost figures are not available, for example those costs involved in calculating the BEN calculation, the highest figures supportable should be used.

This policy will ensure the penalty plead in the complaint is never lower than any revised penalty calculated later based on more detailed information. It will also encourage sources to provide the litigation team with the more accurate cost or financial information. The penalty may then be recalculated during negotiations where justified under this policy to reflect any appropriate adjustment factors. In administrative cases, where the penalty is recalculated based upon information received in negotiations or the prehearing exchange, the administrative complaint must be amended to reflect the new amount if the case is going to or expected to go to hearing. This will ensure the complaint reflects the amount the government is prepared to justify at the hearing. This pleading policy also fulfills the obligation of 40 C.F.R. § 22.14(a)(5) that all administrative complaints include "a statement explaining the reasoning behind the proposed penalty."

This policy reflects the factors enumerated in Section 113(e) that the court (in Section 113(b) actions) and the Administrator (in Section 113(d) actions) shall take into consideration in the assessment of any penalty. These factors include: the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation and such other factors as justice may require.

This document is not meant to control the penalty amount requested in judicial actions to enforce existing consent decrees.[1] In judicial cases, the use of this guidance is limited to pre-trial settlement of enforcement actions. In a trial, government attorneys may find it relevant and helpful to introduce a penalty calculated under this policy, as a point of reference in a demand for penalties. However, once a case goes to trial, government attorneys should demand a larger penalty than the minimum settlement figure as calculated under the policy.

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[1] In these actions, EPA will normally seek the penalty amount dictated by the stipulated penalty provisions of the consent decree. If a consent decree contains no stipulated penalty provisions, the case development team should propose penalties suitable to vindicate the authority of the Court.

The general policy applies to most Clean Air Act violations. There are some types of violations, however, that have characteristics which make the use of the general policy inappropriate. These are treated in separate guidance, included as appendices. Appendix I covers violations of PSD/NSR permit requirements. Appendix II deals with the gravity component for vinyl chloride NESHAP violations. Appendix III covers the economic benefit and gravity components for asbestos NESHAP demolition and renovation violations. The general policy applies to violations of volatile organic compound regulations where the method of compliance involves installation of control equipment. Separate guidance is provided for VOC violators which comply through reformulation (Appendix IV). Appendix VI deals with the gravity component for volatile hazardous air pollutants violations. Appendix VII covers violations of the residential wood heaters NSPS regulations. Violations of the regulations to protect stratospheric ozone are covered in Appendix VIII. These appendixes specify how the gravity component and/or economic benefit components will be calculated for these types of violations. Adjustment, aggravation or mitigation, of penalties calculated under any of the appendixes is governed by this general penalty policy.

This penalty policy contains two components. First, it describes how to achieve the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. Second, it discusses adjustment factors applied so that a fair and equitable penalty will result. The litigation team[2] should calculate the full economic benefit and gravity components and then decide whether any of the adjustment factors applicable to either component are appropriate. The final penalty obtained should never be lower than the penalty calculated under this policy taking into account all appropriate adjustment factors including litigation risk and inability to pay.

All consent agreements should state that penalties paid pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f).

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[2] With respect to civil judicial cases, the litigation team will consist of the Assistant Regional Counsel, the Office of Enforcement attorney, the Assistant United States Attorney, the Department of Justice attorney from the Environmental Enforcement Section, and EPA technical professionals assigned to the case. With respect to administrative cases, the litigation team will generally consist of the EPA technical professional and Assistant Regional Counsel assigned to the case. The recommendation of the litigation team must be unanimous. If a unanimous position cannot be reached, the matter should be escalated and a decision made by EPA and the Department of Justice managers, as required.

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

This penalty policy is effective immediately with respect to all cases in which the first penalty offer has not yet been transmitted to the opposing party.

II. THE PRELIMINARY DETERRENCE AMOUNT

The February 16, 1984, Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it says that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance. In addition, it should include an amount beyond recovery of the economic benefit to reflect the seriousness of the violation. That portion of the penalty which recovers the economic benefit of noncompliance is referred to as the "economic benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section provides guidelines for calculating the economic benefit component and the gravity component. It will also discuss the limited circumstances which justify adjusting either component.

A. THE ECONOMIC BENEFIT COMPONENT

In order to ensure that penalties recover any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the economic benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues to be considered when computing the economic benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. The section concludes with a discussion of the limited circumstances where the economic benefit component may be mitigated.

1. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which

fails to install a scrubber will eventually have to spend the money needed to install the scrubber in order to achieve compliance. But, by deferring these capital costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which may result in savings from deferred cost are the following:

- Failure to install equipment needed to meet emission control standards.
- Failure to effect process changes needed to reduce pollution.
- Failure to test where the test still must be performed.
- Failure to install required monitoring equipment.

The economic benefit of delayed compliance should be computed using the "Methodology for Computing the Economic Benefit of Noncompliance," which is Technical Appendix A of the BEN User's Manual. This document provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method is a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and the Clean Air Act. BEN is a computer program available to the Regions for performing the analysis. Questions concerning the BEN model should be directed to the Program Development and Training Branch in the Office of Enforcement, FTS 475-6777.

2. Benefit from avoided costs

Many types of violations enable a violator to avoid permanently certain costs associated with compliance. These include cost savings for:

- Disconnecting or failing to properly operate and maintain existing pollution control equipment (or other equipment if it affects pollution control).
- Failure to employ a sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Removal of pollution equipment resulting in process, operational, or maintenance savings.
- Failure to conduct a test which is no longer required.

- Disconnecting or failing to properly operate and maintain required monitoring equipment.

- Operation and maintenance of equipment that the violator failed to install.

The benefit from avoided costs must also be computed using methodology in Technical Appendix A of the BEN User's Manual.

The benefit from delayed and avoided costs is calculated together, using the BEN computer program, to arrive at an amount equal to the economic benefit of noncompliance for the period from the first provable date of violation until the date of compliance.

As noted above, the BEN model may be used to calculate only the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of the Clean Air Act and its implementing regulations. There are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Agency to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the BEN methodology.

In some instances this may include calculating and including in the economic benefit component profits from illegal activities. An example would be a source operating without a preconstruction review permit under PSD/NSR regulations or without an operating permit under Title V. In such a case, an additional calculation would be performed to determine the present value of these illegal profits which would be added to the BEN calculation for the total economic benefit component. Care must be taken to account for the preassessed delayed or avoided costs included in the BEN calculation when calculating illegal profits. Otherwise, these costs could be assessed twice. The delayed or avoided costs already accounted for in the BEN calculation should be subtracted from any calculation of illegal profits.

3. Adjusting the Economic Benefit Component

As noted above, settling for an amount which does not recover the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to adjust or mitigate this amount. There are three general circumstances (described below) in which mitigating the economic benefit component may be appropriate. However, in any individual case where the Agency decides to mitigate the economic benefit component, the litigation team must detail those reasons in the case file and in any memoranda accompanying the settlement.

Following are the limited circumstances in which EPA can mitigate the economic benefit component of the penalty:

a. Economic benefit component involves insignificant amount

Assessing the economic benefit component and subsequent negotiations will often represent a substantial commitment of resources. Such a commitment may not be warranted in cases where the magnitude of the economic benefit component is not likely to be significant because it is not likely to have substantial financial impact on the violator. For this reason, the litigation team has the discretion not to seek the economic benefit component where it is less than $5,000. In exercising that discretion, the litigation team should consider the following factors:

- Impact on violator: The likelihood that assessing the economic benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by itself, to achieve the goals of this policy. In situations like this, the litigation team should insist on including the economic benefit component in order to develop an adequate penalty.

b. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider mitigating the economic benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlement might be appropriate where the following circumstances occur:

- The economic benefit component may be mitigated where recovery would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business. Alternative payment plans, such as installment payments with interest, should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where

there is a likelihood of continued harmful noncompliance.

The economic benefit component may also be mitigated in enforcement actions against nonprofit public entities, such as municipalities and publicly-owned utilities, where assessment threatens to disrupt continued provision of essential public services.

c. Concurrent Section 120 administrative action

EPA will not usually seek to recover the economic benefit of noncompliance from one violation under both a Section 113(b) civil judicial action or 113(d) civil administrative action and a Section 120 action. Therefore, if a Section 120 administrative action is pending or has been concluded against a source for a particular violation and an administrative or judicial penalty settlement amount is being calculated for the same violation, the economic benefit component need not include the period of noncompliance covered by the Section 120 administrative action.

In these cases, although the Agency will not usually seek double recovery, the litigation team should not automatically mitigate the economic benefit component by the amount assessed in the Section 120 administrative action. The Clean Air Act allows dual recovery of the economic benefit, and so each case must be considered on its individual merits. The Agency may mitigate the economic benefit component in the administrative or judicial action if the litigation team determines such a settlement is equitable and justifiable. The litigation team should consider in making this decision primarily whether the penalty calculated without the Section 120 noncompliance penalty is a sufficient deterrent.

B. THE GRAVITY COMPONENT

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should recover any economic benefit of noncompliance, and should also include an amount reflecting the seriousness of the violation. Section 113(e) instructs courts to take into consideration in setting the appropriate penalty amount several factors including the size of the business, the duration of the violation, and the seriousness of the violation. These factors are reflected in the "gravity component." This section of the policy establishes an approach to quantifying the gravity component.

Assigning a dollar figure to represent the gravity of the violation is a process which must, of necessity, involve the consideration of a variety of factors and circumstances. Linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way. These

objective factors are designed to reflect those listed in Section 113(e) of the Act.

The specific objective factors in this civil penalty policy designed to measure the seriousness of the violation and reflect the considerations listed in the Clean Air Act are as follows:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. For example, the NSPS regulations require owners and operators of new sources to conduct emissions testing and report the results within a certain time after start-up. If a source owner or operator does not report the test results, EPA would have no way of knowing whether that source is complying with NSPS emissions limits.

- Size of violator: The gravity component should be increased, in proportion to the size of the violator's business.

The assessment of the first gravity component factor listed above, actual or possible harm arising from a violation, is a complex matter. For purposes of determining how serious a given violation is, it is possible to distinguish violations based on certain considerations, including the following:

- Amount of pollutant: Adjustments based on the amount of the pollutant emitted are appropriate.

- Sensitivity of the environment: This factor focuses on where the violation occurred. For example, excessive emissions in a nonattainment area are usually more serious than excessive emissions in an attainment area.

- Toxicity of the pollutant: Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.

- The length of time a violation continues: Generally, the longer a violation continues uncorrected, the greater the risk of harm.

- Size of violator: A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.

The following dollar amounts assigned to each factor should be added together to arrive at the total gravity component:

1. Actual or possible harm

a. Level of violation

Percent Above Standard[3]	Dollar Amount
1 - 30%	$ 5,000
31 - 60%	10,000
61 - 90%	15,000
91 - 120%	20,000
121 - 150%	25,000
151 - 180%	30,000
181 - 210%	35,000
211 - 240%	40,000
241 - 270%	45,000
271 - 300%	50,000
over 300%	50,000 + $5,000 for each 30% or fraction of 30% increment above the standard

This factor should be used only for violations of emissions standards. Ordinarily the highest documented level of violation should be used. If that level, in the opinion of the litigation team, is not representative of the period of violation, then a more representative level of violation may be used. This figure should be assessed for each emissions violation. For example, if a source which emits particulate matter is subject to both an opacity standard and a mass emission standard and is in violation of both standards, this figure should be assessed for both violations.

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[3] Compliance is equivalent to 0% above the emission standard.

b. Toxicity of the pollutant

Violations of NESHAPs emission standards not handled by a separate appendix and non-NESHAP emission violations involving pollutants listed in Section 112(b)(1) of the Clean Air Act Amendments of 1990*: $15,000 for each hazardous air pollutant for which there is a violation.

c. Sensitivity of environment (for SIP and NSPS cases only).

The penalty amount elected should be based on the status of the air quality control district in question with respect to the pollutant involved in the violation.

1. Nonattainment Areas

i. Ozone:

Extreme	$18,000
Severe	16,000
Serious	14,000
Moderate	12,000
Marginal	10,000

ii. Carbon Monoxide and Particulate Matter:

Serious	$14,000
Moderate	12,000

iii. All Other Criteria Pollutants: $10,000

2. Attainment area PSD Class I: $ 10,000

3. Attainment area PSD Class II or III: $ 5,000

d. Length of time of violation

To determine the length of time of violation for purposes of calculating a penalty under this policy, violations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance if there have been no significant process or operational changes. If the source has affirmative evidence, such as continuous emission monitoring data,

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* An example of a non-NESHAP violation involving a hazardous air pollutant would be a violation of a volatile organic compound (VOC) standard in a State Implementation Plan involving a VOC contained in the Section 112(b)(1) list of pollutants for which no NESHAP has yet been promulgated.

to show that the violation was not continuous, appropriate adjustments should be made. In determining the length of violation, the litigation team should take full advantage of the presumption regarding continuous violation in Section 113(e)(2). This figure should be assessed separately for each violation, including procedural violations such as monitoring, recordkeeping and reporting violations. For example, if a source violated an emissions standard, a testing requirement, and a reporting requirement, three separate length of violation figures should be assessed, one for each of the three violations based on how long each was violated.

Months	Dollars
0 - 1	$ 5,000
2 - 3	8,000
4 - 6	12,000
7 - 12	15,000
13 - 18	20,000
19 - 24	25,000
25 - 30	30,000
31 - 36	35,000
37 - 42	40,000
43 - 48	45,000
49 - 54	50,000
55 - 60	55,000

2. Importance to the regulatory scheme

The following violations are also very significant in the regulatory scheme and therefore require the assessment of the following penalties:

Work Practice Standard Violations:
- failure to perform a work practice requirement: $10,000-15,000
  (See Appendix III for Asbestos NESHAP violations.)

Reporting and Notification Violations:
- failure to report or notify: $15,000
- late report or notice: $5,000
- incomplete report or notice: $5,000 - $15,000

(See Appendix III for Asbestos NESHAP violations.)

Recordkeeping Violations:
- failure to keep required records: $15,000
- incomplete records: $5,000 - $15,000

Testing Violations:
- failure to conduct required performance testing or testing using an improper test method: $15,000
- late performance test or performing a required test method using an incorrect procedure: $5,000

Permitting Violations:
- failure to obtain an operating permit: $15,000
- failure to pay permit fee: See Section 502(b)(3)(C)(ii) of the Act

Emission Control Equipment Violations:
- failure to operate and maintain control equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- intermittent or improper operation or maintenance of control equipment: $5,000-15,000

Monitoring Violations:
- failure to install monitoring equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- late installation of required monitoring equipment: $5,000
- failure to operate and maintain required monitoring equipment: $15,000

Violations of Administrative Orders[a]: $15,000

Section 114 Requests for Information Violations:
- failure to respond: $15,000
- incomplete response: $5,000 - $15,000

Compliance Certification Violations:
- failure to submit a certification: $15,000
- late certifications: $5,000
- incomplete certifications: $5,000 - $15,000

Violations of Permit Schedules of Compliance:
- failure to meet interim deadlines: $5,000
- failure to submit progress reports: $15,000
- incomplete progress reports: $5,000 - $15,000
- late progress reports: $5,000

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[a] This figure should be assessed even if the violation of the administrative order is also a violation of another requirement of the Act, for example a NESHAP or NSPS requirement. In this situation, the figure for violation of the administrative order is in addition to appropriate penalties for violating the other requirement of the Act.

A penalty range is provided for work practice violations to allow Regions some discretion depending on the severity of the violation. Complete disregard of work practice requirements should be assessed the full $15,000 penalty. Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status, this omission should be treated as a failure to meet the requirement and assessed $15,000.

A late notice, report or test should be considered a failure to notify, report or test if the notice or report is submitted or the test is performed after the objective of the requirement is no longer served. For example, if a source is required to submit a notice of a test so that EPA may observe the test, a notice received after the test is performed would be considered a failure to notify.

Each separate violation under this section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at startup and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed $15,000 under this section for each violation. In addition, a length of violation figure should be assessed for each violation based on how long each has been violated. Also, a figure reflecting the size of the violator should be assessed once for the case as a whole. If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one $15,000 penalty under this section for failure to submit a report. In addition, a length of violation figure of $15,000 for 12 months of violation and a size of the violator figure should be assessed.

3. Size of the violator

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

Under $100,000	$2,000
$100,001 - $1,000,000	5,000
1,000,001 - 5,000,000	10,000
5,000,001 - 20,000,000	20,000
20,000,001 - 40,000,000	35,000
40,000,001 - 70,000,000	50,000
70,000,001 - 100,000,000	70,000
Over 100,000,000	70,000 + $25,000 for every additional $30,000,000 or fraction thereof

In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

The process by which the gravity component was computed must be memorialized in the case file. Combining the economic benefit component with the gravity component yields the preliminary deterrence amount.

4. Adjusting the Gravity Component

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the economic benefit component discussed above in a civil penalty assessment. This approach prevents violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce consistent enough results to ensure similarly-situated violators are treated similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the gravity component amount when those facts occur. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. It sets guidelines for adjusting the gravity component which account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of

cooperation as specified in II.B.4.b. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

a. Degree of Willfulness or Negligence

This factor may be used only to raise a penalty. The Clean Air Act is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, this does not render the violator's willfulness or negligence irrelevant in assessing an appropriate penalty. Knowing or willful violations can give rise to criminal liability, and the lack of any negligence or willfulness would indicate that no addition to the penalty based on this factor is appropriate. Between these two extremes, the willfulness or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness or negligence, all of the following points should be considered:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
- The extent to which the violator in fact knew of the legal requirement which was violated.

b. Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the

gravity component because the source is not making efforts to come into compliance and is negotiating with the agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance

The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.

2. Prompt correction of environmental problems

The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.

3. Cooperation during pre-filing investigation

Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

c. History of Noncompliance

This factor may be used only to raise a penalty. Evidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous governmental enforcement response. Unless one of the violations was caused by factors entirely out of the control of the violator, the penalty should be increased. The litigation team should check for and consider prior violations under all environmental statutes enforced by the Agency in determining the amount of the adjustment to be made under this factor.

In determining the size of this adjustment, the litigation team should consider the following points:

- Similarity of the violation in question to prior violations.

- Time elapsed since the prior violation.
- The number of prior violations.
- Violator's response to prior violation(s) with regard to correcting the previous problem and attempts to avoid future violations.
- The extent to which the gravity component has already been increased due to a repeat violation. (For example, under the Asbestos Demolition and Renovation Penalty Policy in Appendix III.)

A violation should generally be considered "similar" if a previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts indicating a "similar violation" are:

- Violation of the same permit.
- Violation of the same emissions standard.
- Violation at the same process points of a source.
- Violation of the same statutory or regulatory provision.
- A similar act or omission.

For purposes of this section, a "prior violation" includes any act or omission resulting in a State, local, or federal enforcement response (e.g., notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Agency unless subsequently dismissed or withdrawn on the grounds that the party was not liable. It also includes any act or omission for which the violator has previously been given written notification, however informal, that the regulating agency believes a violation exists. In researching a defendant's compliance history, the litigation team should check to see if the defendant has been listed pursuant to Section 306 of the Act.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a prior violation by the parent corporation should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the litigation team should ascertain who in the organization exercised or had authority to exercise control or oversight responsibility over the violative conduct. Where the parent corporation exercised or had authority to exercise control over the violative conduct,

the parent corporation's prior violations should be considered part of the subsidiary or division's compliance history.

In general, the litigation team should begin with the assumption that if the same corporation was involved, the adjustment for history of noncompliance should apply. In addition, the team should be wary of a party changing operations or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating corporate facilities are under totally independent control.

d. Environmental Damage

Although the gravity component already reflects the amount of environmental damage a violation causes, the litigation team may further increase the gravity component based on severe environmental damage. As calculated, the gravity component takes into account such factors as the toxicity of the pollutant, the attainment status of the area of violation, the length of time the violation continues, and the degree to which the source has exceeded an emission limit. However, there may be cases where the environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

III. LITIGATION RISK

The preliminary deterrence amount, both economic benefit and gravity components, may be mitigated in appropriate circumstances based on litigation risk. Several types of litigation risk may be considered. For example, regardless of the type of violations a defendant has committed or a particular defendant's reprehensible conduct, EPA can never demand more in civil penalties than the statutory maximum (twenty-five thousand dollars per day per violation). In calculating the statutory maximum, the litigation team should assume continuous noncompliance from the first date of provable violation (taking into account the five year statute of limitations) to the final date of compliance where appropriate, fully utilizing the presumption of Section 113(e)(2). When the penalty policy yields an amount over the statutory maximum, the litigation team should propose an alternative penalty which must be concurred on by their respective management just like any other penalty.

Other examples of litigation risks would be evidentiary problems, or an indication from the court, mediator, or Administrative Law Judge during settlement negotiations that he or she is prepared to recommend a penalty below the minimum settlement amount. Mitigation based on these concerns should consider the specific facts, equities, evidentiary issues or legal problems pertaining to a particular case as well as the credibility of government witnesses.

Adverse legal precedent which the defendant argues is indistinguishable from the current enforcement action is also a valid litigation risk. Cases raising legal issues of first impression should be carefully chosen to present the issue fairly in a factual context the Agency is prepared to litigate. Consequently in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. If an issue of first impression is litigated and EPA's position is upheld by the court, the mitigation was not justified. If EPA's position is not upheld, it is generally better that the issue be decided than to avoid resolution by accepting a low penalty. Mitigation based on litigation risk should be carefully documented and explained in particular detail. In judicial cases this should be done in coordination with the Department of Justice.

IV. ABILITY TO PAY

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary deterrence amount, both gravity component and economic benefit component. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The litigation team should assess this factor after commencement of negotiations only if the source raises it as an issue and only if the source provides the necessary financial information to evaluate the source's claim. The source's ability to pay should be determined according to the December 16, 1986 Guidance on Determining a Violator's Ability to Pay a Civil Penalty (GM-56) along with any other appropriate means.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any other mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the litigation team should disregard this factor in adjusting the penalty. The Office of Enforcement Policy has developed the capability to assist the Regions in determining a firm's ability to pay. This is done through the computer program, ABEL. If ABEL indicates that the source may have an inability to pay, a more detailed financial analysis verifying the ABEL results should be done prior to mitigating the penalty.

Consider delayed payment schedule with interest: When EPA determines that a violator cannot afford the penalty prescribed by this policy, the next step is to consider a delayed payment schedule with interest. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. EPA's computer program, ABEL, can calculate a delayed payment amount for up to five years.

Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the litigation team's conclusion as to the size of the necessary reduction should be carefully documented in the case file.*

Consider joinder of a corporate violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances. Joinder is not legally possible for SIP cases unless the prerequisite of Section 113 of the Clean Air Act has been met -- issuance of an NOV to the person.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is always expected to comply with the law.

V. OFFSETTING PENALTIES PAID TO STATE AND LOCAL GOVERNMENTS OR CITIZEN GROUPS FOR THE SAME VIOLATIONS

Under Section 113(e)(1), the court in a civil judicial action or the Administrator in a civil administrative action must consider in assessing a penalty "payment by the violator of penalties previously assessed for the same violation." While EPA will not automatically subtract any penalty amount paid by a source to a State or local agency in an enforcement action or to a citizen

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* If a firm fails to pay the agreed to penalty in a final administrative or judicial order, then the Agency must follow the procedures outlined in the February 6, 1990 Manual on Monitoring and Enforcing Administrative and Judicial Orders for collecting the penalty amount.

group in a citizen suit for the same violation that is the basis for EPA's enforcement action, the litigation team may do so if circumstances suggest that it is appropriate. The litigation team should consider primarily whether the remaining penalty is a sufficient deterrent.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements must be followed when reducing a penalty for such a project in any Clean Air Act settlement.

VII. CALCULATING A PENALTY IN CASES WITH MORE THAN ONE TYPE OF VIOLATION

EPA often takes an enforcement action against a stationary source for more than one type of violation of the Clean Air Act. The economic benefit of noncompliance with all requirements violated should be calculated. Next, the gravity component factors under actual or possible harm and importance to the regulatory scheme which are applicable should be calculated separately for each violation. The size of the violator factor should be figured only once for all violations.

For example, consider the case of a plant which makes laminated particle board. The particle board plant is found to emit particulates in violation of the SIP particulate emission limit and the laminating line which laminates the particle board with a vinyl covering is found to emit volatile organic compounds in violation of the SIP VOC emission limit. The penalty for the particulate violation should be calculated figuring the economic benefit of not complying with that limit (capital cost of particulate control, etc., determined by running the BEN computer model), and then the gravity component for this violation should be calculated using all the factors in the penalty policy. After the particulate violation penalty is determined, the VOC violation should be calculated as follows: the economic benefit should be calculated if additional measures need to be taken to comply with the VOC limit. In addition, a gravity component should be calculated for the VOC violation using all the applicable factors under actual or possible harm and importance to the regulatory scheme. The size of the violator factor should be figured only once for both violations.

Another example would be a case where, pursuant to Section 114, EPA issues a request for information to a source which emits SO_2, such as a coal-burning boiler. The source does not respond. Two months later, EPA issues an order under Section 113(a) requiring the source to comply with the Section 114 letter. The source does not respond. Three months later, EPA inspects the source and determines that the source is violating the SIP SO_2 emission limit.

In this case, separate economic benefits should be calculated, if applicable. Thus, if the source obtained any economic benefit from not responding to the Section 114 letter or obeying the Section 113(a) order, that should be calculated. If not, only the economic benefit from the SO_2 emission violation should be calculated using the BEN computer model. In determining the gravity component, the penalty should be calculated as follows:

1. Actual or possible harm

   a. level of violation - calculate for the emission violation only

   b. toxicity of pollutant - applicable to the emission violation only

   c. sensitivity of environment - applicable to the emission violation only

   d. length of time of violation - separately calculate the time for all three violations. Note the Section 114 violation continues to run even after the Section 113(a) order is issued until the Section 114 requirements are satisfied.

2. Importance to regulatory scheme

   Section 114 request for information violation - $15,000
   Section 113 administrative order violation - $15,000

3. Size of violator

   a. One figure based on the source's assets.

VIII. APPORTIONMENT OF THE PENALTY AMONG MULTIPLE DEFENDANTS

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, there may be more than one defendant. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the defendants allocate among themselves. Civil

violations of the Clean Air Act are strict liability violations and it is generally not in the government's interest to get into discussions of the relative fault of the individual defendants. The government should therefore adopt a single settlement figure for the case and should not reject a settlement consistent with the bottom line settlement figure because of the way the penalty is allocated.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or aggravation due to prior violations), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. If the case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants.

There are limited circumstances where the Government may try to influence apportionment of the penalty. For example, if one party has a history of prior violations, the Government may try to assure that party pays the amount the gravity component has been aggravated due to the prior violations. Also, if one party is known to have realized all or most of the economic benefit, that party may be asked to pay that amount.

IX. EXAMPLES

Example 1

I. Facts:

Company A runs its manufacturing operations with power produced by its own coal-fired boilers[7]. The boilers are major sources of sulfur dioxide. The State Implementation Plan has a sulfur dioxide emission limitation for each boiler of .68 lbs. per million B.T.U. The boilers were inspected by EPA on March 19, 1989, and the SO_2 emission rate was 3.15 lbs. per million B.T.U for each boiler. A NOV was issued for the SO_2 violations on April 10, 1989. EPA again inspected Company A on June 2, 1989 and found the

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[7] Note that a penalty is assessed for the entire facility and not for each emission unit. In this example, the source has several boilers. However, the penalty figures are not multiplied by the number of boilers. The penalty is based on the violations at the facility as a whole, specifically the amount of pollutant factor and length of violation factor are assessed once based on the amount of excess emissions at the facility from all the boilers.

SO_2 emission rate to be unchanged. Company A had never installed any pollution control equipment on its boilers, even though personnel from the state pollution control agency had contacted Company A and informed it that the company was subject to state air pollution regulations. The state had issued an administrative order on September 1, 1988 for SO_2 emission violations at the same boilers. The order required compliance with applicable regulations, but Company A had never complied with the state order. Company A is located in a nonattainment area for sulfur oxides. Company A has net current assets of $760,000. Company A's response to an EPA Section 114 request for information documented the first provable day of violation of the emission standard as July 1, 1988.

II. Computation of penalty

A. Economic benefit component

EPA used the BEN computer model in the standard mode to calculate the economic benefit component. The economic benefit component calculated by the computer model was $243,500.

B. Gravity component

1. Actual or possible harm

a. Amount of pollutant: between 360-390% above standard - $65,000

b. Toxicity of pollutant: not applicable.

c. Sensitivity of the environment: nonattainment - $10,000

d. Length of time of violation: Measured from the date of first provable violation, July 1, 1988 to the date of final compliance under a consent decree, hypothetically December 1, 1991. (If consent decree or judgment order is filed at a later date, this element, as well as elements in the economic benefit component must be recalculated.) 41 mos. - $40,000

2. Importance to regulatory scheme.

No applicable violations.

3. Size of violator: net assets of $760,000 - $5,000.

$243,500 economic benefit component
+120,000 gravity component
$363,500 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

Because Company A was on notice of its violations and, moreover, disregarded the state administrative order to comply with applicable regulations, the gravity component in this example should be aggravated by some percentage based on this factor.

2. Degree of Cooperation

No adjustments were made in the category because Company A did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by some percentage for this factor because Company A violated the state order issued for the same violation.

Initial penalty figure: $353,500 preliminary deterrence amount plus adjustments for history of noncompliance and degree of willfulness or negligence.

Example 2:

I. Facts:

Company C, located in a serious nonattainment area for particulate matter, commenced construction in January 1988. It began its operations in April 1989. It runs a hot mix asphalt plant subject to the NSPS regulations at 40 C.F.R. Part 60, Subpart I. Subpart I requires that emissions of particulates not exceed 90 mg/dscm (.04 gr/dscf) nor exhibit 20% opacity or greater. General NSPS regulations require that a source owner or operator subject to a NSPS fulfill certain notification and recordkeeping functions (40 C.F.R. § 60.7), and conduct performance tests and submit a report of the test results (40 C.F.R. § 60.8).

Company C failed to notify EPA of the date it commenced construction within 30 days after such date (February 1988)(40

C.F.R. § 60.7(a)(1)); the date of anticipated start-up between 30-60 days prior to such date (March, 1989)(40 C.F.R. § 60.7(a)(2)); or the date of actual start-up within 15 days after such date (April, 1989) (40 C.F.R. § 60.7(a)(3). Company C was required under 40 C.F.R. § 60.8(a) to test within 180 days of start-up, or by October 1989. The company finally conducted the required performance test in September 1990. The test showed the plant to be emitting 120 mg/dscm of particulates and to exhibit 30% opacity.

Company C did submit the required notices in November 1989 in response to a letter from EPA informing it that it was subject to NSPS requirements. It did negotiate with EPA after the complaint was filed in September 1991, and agreed to a consent decree requiring compliance by December 1, 1991. Company C has assets of $7,000,000.

II. Computation of penalty

A. Benefit component

The Region determined after calculation that the economic benefit component was $90,000 for violation of the emissions standard according to the BEN computer calculation. The litigation team determined that the economic benefit from the notice and testing requirement was less than $5,000. Therefore, the litigation team has discretion not to include this amount in the penalty consistent with the discussion at II.A.3.a.

B. Gravity component

1. Actual or possible harm

a. Amount of pollutant:

i. mass emission standard:
33% above standard - $10,000
ii. opacity standard:
50% over standard - $10,000

b. Toxicity of pollutant: not applicable

c. Sensitivity of the environment:
serious nonattainment - $14,000

d. Length of time of violation

1) Performance testing: October, 1989 - September 1990: 12 months - $15,000

2) Failure to report commencement of construction: February 1988 - November 1989: 21 months (date of EPA's first letter to Company) - $25,000

3) Failure to report actual start-up: April, 1989 - November 1989: 7 months - $15,000

4) Failure to report date of anticipated startup between 30-60 days prior to such date: March, 1989 - November 1989: 8 months - $15,000

5) Mass Emission Standard Violation: September 1990 - December 1991: 15 months - $20,000

6) Opacity Violation: September 1990 - December 1991: 15 months - $20,000

2. Importance to regulatory scheme:

Failure to notify 40 C.F.R. § 60.7(a)(1) - $15,000
Failure to notify 40 C.F.R. § 60.7(a)(2) - $15,000
Failure to notify 40 C.F.R. § 60.7(a)(3) - $15,000
Failure to conduct required performance test 40 C.F.R. § 60.8(a) - $15,000

3. Size of violator: Net current Assets - $7,000,000 - $20,000

$ 90,000 economic benefit component
224,000 gravity component
$314,000 preliminary deterrence amount

C. Adjustment factors

1. Degree of willfulness/negligence

No adjustments were made based on willfulness in this category because there was no evidence that Company C knew of the requirements prior to receiving the letter from EPA. Specific evidence may suggest that the company's violations were due to negligence justifying an aggravation of the penalty on that basis.

2. Degree of Cooperation

No adjustments were made in this category because Company C did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by an amount agreed to by the litigation team for this factor because the source ignored two letters from EPA informing them of the requirements.

Example 3:

I. Facts

Chemical Inc. operates a mercury cell chlor-alkali plant which produces chlorine gas. The plant is subject to regulations under the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for mercury, 40 C.F.R. Part 61, Subpart E. On September 9, 1990, EPA inspectors conducted an inspection of the facility, and EPA required the source to conduct a stack test pursuant to Section 114. The stack test showed emissions at a rate of 3000 grams of mercury per 24-hour period. The mercury NESHAP states that emissions from mercury cell chlor-alkali plants shall not exceed 2300 grams per 24-hour period. The facility has been in operation since June 1989.

In addition under 40 C.F.R. § 61.53, Chemical Inc. either had to test emissions from the cell room ventilation system within 90 days of the effective date of the NESHAP or follow specified approved design, maintenance and housekeeping practices. Chemical Inc. has never tested emissions. Therefore, it has committed itself to following the housekeeping requirements. At the inspection, EPA personnel noted the floors of the facility were badly cracked and mercury droplets were found in several of the cracks. The inspectors noted that the mercury in the floor cracks was caused by leaks from the hydrogen seal pots and compressor seals which housekeeping practices require be collected and confined for further processing to collect mercury. A follow up inspection was conducted on September 30, 1990 and showed that all of the housekeeping requirements were being observed.

Chemical Inc. will have to install control equipment to come into compliance with the emissions standard. A complaint was filed in June 1991. The equipment was installed and operational by June 1992. A consent decree was entered and penalty paid in February 1992. Chemical Inc. has a net corporate worth of $2,000,000.

II. Calculation of Penalty

A. Economic Benefit Component

The delay in installing necessary control equipment from June 1989 to June 1992 as calculated using the BEN computer model resulted in an economic benefit to Chemical Inc. of $35,000.

B. Gravity Component

1. Actual or possible harm

a. Amount of pollutant: 30 % above the standard - $5,000

b. Toxicity of pollutant : $15,000 for violations involving a NESHAP

c. Sensitivity of the environment: not applicable

d. Length of time of violation:

1) Emissions violation: 22 mos. - $25,000

2) Work Practice violation: 1 mo. - $5,000

2. Importance to regulatory scheme.

Failure to perform work practice requirements - $15,000

3. Size of Violator: net worth of $2,000,000 - $10,000

$35,000 economic benefit component
+75,000 gravity component
$110,000 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

It is unlikely Chemical Inc. would not be aware of the NESHAP requirements. Therefore, an adjustment should probably be made for this factor.

2. Degree of Cooperation

No adjustments made because Chemical Inc. did not meet the criteria.

3. History of Compliance

No adjustments were made because Chemical Inc. had no prior violations.

X. CONCLUSION

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial amount prior to beginning settlement negotiations or an adjusted amount after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed as required by the August 9. 1990 Guidance on Documenting Penalty Calculations and Justifications in EPA Enforcement Actions. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each other's experience and promote the fairness required by the Policy on Civil Penalties.

Criterion Laboratories, Incorporated

Daily Log Page 1 of ___

ACCOUNT: Abington Hospital

PROJECT #: 960408 **DATE:** 7-9-96

SITE ADDRESS: 1200 Old York Rd
Abington PA 19001

SUMMARY OF EVENTS

0550 Met with Joe Mahoney of Delta at Transfer area of Hospital.

0705 Delta and I mobilize.

0730 Delta is suiting up. Joe showed me west side of Old O.R. area where fittings will be removed from individual rooms. Joe also said he would have two workers above ceiling removing fittings on west side of building

0800 Two samples running Removal under way

0900 Removal continues.

0945 Samples collected fittings still being removed

~~1130~~ work above east side of ceiling continues

1130 Delta lunch Break begins Joe notified plumbers of pipe brea

1230 Delta lunch Break over Plumbers fixed leaking pipe

1235 Work resumes above ceiling and in O.R. Rooms

1300 Delta is demoing more pipe chases and removal continues. Some Fixtures are being disconnected to get to Asbestos material

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Rev. 10/9

Field Technician Signature [signature]

Daily Log

ACCOUNT: Abington Hospital

PROJECT #: 960408 **DATE:** 7-9-96

SITE ADDRESS: 1200 Old York Rd
Abington PA 19001

SUMMARY OF EVENTS

1400 Demolition of pipe chases continues on east side
1500 Belts moving bags into storage area.
1520 Workers finishing up for the day
1530 Off site

FORM G-101G
Rev. 10/9

Field Technician Signature [signature]

EPA Prehearing Exchange Exhibit 16

CRITERION LABORATORIES, INC.
3370 Progress Drive, Suite J
Bensalem, PA 19020

RESULTS OF ENVIRONMENTAL MONITORING - ASBESTOS
Phase Contrast Microscopy - NIOSH Method 7400A

Client Name: Abington Hospital

Project Number: 960408

Site Location: 1200 Old York Rd., Abington, Pa.- Highland Bldg. Fl.2 Old O.R.

Sample Number	Sample Location	Date Sampled	Flow Rate L/Min.	Time Min	Sample Vol. Litere	Fiber Density Fibers/Sq.MM	Fiber Concentration Fibers/CC
7957-01	AREA SAMPLE INSIDE WORK AREA CENTRAL AT WATER FOUNTAIN	07/09/96	12.01	126	1513.26	20.38	0.005
7957-02	AREA SAMPLE OUTSIDE WORK AREA AT ENTRANCE TO OLD O.R. SUPPLY ROOM	07/09/96	12.01	124	1489.24	22.29	0.006
7957-03	AREA SAMPLE INSIDE WORK AREA CENTRAL AT WATER FOUNTAIN	07/09/96	12.01	128	1537.28	36.31	0.009
7957-04	AREA SAMPLE OUTSIDE AREA AT ENTRANCE TO OLD O.R. SUPPLY ROOM	07/09/96	12.01	128	1537.28	9.55	0.002

I certify that the above sample(s) were taken and the fiber counts performed in strict compliance with NIOSH 7400 standards and regulations.

James A. Weltz, CIH

Laboratory Quality Control Data
Relative Standard Deviations
Intralab: L.0.23 M. 0.15 H.0.12
Interlab: L. M. H.

Masters\PCMAIR.LOG

CRITERION LABORATORIES, INC.
3370 Progress Drive, Suite J
Bensalem, PA 19020

RESULTS OF ENVIRONMENTAL MONITORING - ASBESTOS
Phase Contrast Microscopy - NIOSH Method 7400A

Client Name: Abington Hospital

Project Number: 960408

Site Location: 1200 Old York Rd., Abington, Pa.- Highland Bldg. Fl.2 Old O.R.

Sample Number	Sample Location	Date Sampled	Flow Rate L/Min.	Time Min	Sample Vol. Liters	Fiber Density Fibers/Sq.MM	Fiber Concentration Fibers/CC
7957-05	QC BLANK SLIDE	07/09/96	N\A	N\A	N\A	<7.0	N\A

I certify that the above sample(s) were taken and the fiber counts performed in strict compliance with NIOSH 7400 standards and regulations.

James A. Weltz, CIH

Laboratory Quality Control Data
Relative Standard Deviations
Intralab: L.0.23 M. 0.15 H.0.12
Interlab: L. M. H.

Masters\ICMAIR.LOG

Criterion Laboratories, Incorpo...

Daily Log

ACCOUNT: Abington Hospital

PROJECT #: 960408 DATE: 7-10-96

SITE ADDRESS: Abington Hospital
1200 Old York Rd
Abington, PA 19001

SUMMARY OF EVENTS

0650 Onsite Inst Joe Mahoney (Delta) and Crew

0722 Delta workers prepare for removal of vertical pipes. More demo work being done before vertical pipes removed in room (Employee lounge & locker room) Fittings being removed.

0730 Joe told me only demo work being done in Locker + Lounge room so removal, maybe 10 this day. Joe, I and one worker went into Basement to look over another area for fittings to be removed & Floor to be clean

0811 Area Joe M. took me was O.R. Mech Room shaft As of now fittings to be removed are undetermined. I've set up one sample at the bottom of ladder which leads to shaft entrance. No outlets in shaft & fittings are located higher. 2 workers preparing for removal. They are mobilizing.

0900 Supply truck onsite (2) Delta workers bringing barrels and other supplies to 2nd Floor.

FORM G-101G
Rev. 10/9

Field Technician Signature Stephen Frantzis

Criterion Laboratories, Incorporated

Daily Log

ACCOUNT: Abington Hospital

PROJECT #: ~~96098~~ 96408 **DATE:** 7-10-96

SITE ADDRESS: Abington Hospital
1200 Old York Rd
Abington PA 19001

SUMMARY OF EVENTS

950 Shaft area in OR Mech room Basement level is Completed @ 12 or more fittings removed and floor still need to be cleaned up.
Old OR, south work area still not completed work mainly above ceiling now.
1040 All samples collected
1100 Demo in OR, Supply room & Employee lounge & Locker room being done.
1200 Basement OR, Mechanical upper room shaft area Lunch Break (SF) is completed and ready for finals
1230 2 Finals started in shaft area. JBe informed me that more fittings were discovered in Old OR South work area.
1300 Lunch break over. JBe said ~~not~~ no # areas will be ready for Finals until tomorrow.
1330 Delta cleaning up demo debris in OR Supply & Lounge & Locker rooms. One sample collected during clean

FORM G-101G
Rev. 10/9

Field Technician Signature [signature]

FORM G-101G
Rev. 10/9

Field Technician Signature [signature]

Criterion Laboratories, Incorporated

Daily Log

ACCOUNT: Abington Hospital

PROJECT #: 960408 **DATE:** 7-10-96

SITE ADDRESS: Abington Hospital
1200 Old York Rd
Abington PA 19001

SUMMARY OF EVENTS

1400 Ends collected Some Fitting were removed clean up and encapsulation ~~were~~ are being performed

1450 EPA inspector Rich Ponak onsite. He is inspecting bags for moisture.

1500 He is checking 12 bags in an area contained He plans on taking samples And Taking pictures

1524 Rich Ponak said of the 12 bags only 2 had moisture. Seven samples were collected.

1530 Mr Ponak also stated that of the bags he searched no glovebags were observed he leaves site

1535 I tell Joe to open bags in this area contained and wet bags he said he would do this tomorrow I leave site

Post-it® Fax Note 7671 | Date 4-7-97 | # of pages ▶ 1
To Rich Ponak | From S Forostiak
Co./Dept. EPA | Co. Criterion Labs
Phone # | Phone # 215 244 1300
Fax # 566-2134 | Fax #

FORM G-101G
Rev. 10/9

Field Technician Signature Stephen Forostiak

Criterion Laboratories, Inc.
Daily Workers Attendance Log

Account: Abington Hospital

Project: 960408 **Date:** 7-10-96

Site Address: Abington Hospital
1200 Old York Rd
Abington PA 19001

Name	License #	Expiration Date
John Jordan	012449	2-1-97
Jesse Hyser	001472	9-19-96
Tyrone Anderson	009102	8-18-96
Joe Mahoney	001477	5-18-97
Jim Sweeny	008815	6-1-97
Carl Deranzes	001467	3-19-97
Bruce MacDonald	007489	3-16-97

EPA Prehearing Exchange Exhibit 18

CRITERION LABORATORIES, INC.
3370 Progress Drive, Suite J
Bensalem, PA 19020

RESULTS OF ENVIRONMENTAL MONITORING - ASBESTOS
Phase Contrast Microscopy - NIOSH Method 7400A

Client Name: Abington Hospital

Project Number: 960408

Site Location: 1200 Old York Rd., Abington, Pa.- Highland Bldg. Fl.2 Old O.R.

Sample Number	Sample Location	Date Sampled	Flow Rate L/Min.	Time Min	Sample Vol. Liters	Fiber Density Fibers/Sq.MM	Fiber Concentration Fibers/CC
7958-01	AREA SAMPLE INSIDE WORK AREA CENTRAL AREA OF OLD O.R. AT WATER FOUNTAIN	07/10/96	9.96	181	1802.76	17.20	0.004
7958-02	AREA SAMPLE OUTSIDE WORK AREA AT ENTRANCE TO O.R. SUPPLY ROOM	07/10/96	9.96	181	1802.76	24.84	0.005
7958-03	AREA SAMPLE BASEMENT O.R. MECH ROOM UPPER LEVEL NEAR SHAFT ENTRANCE	07/10/96	9.96	164	1633.44	18.47	0.004
7958-04	AREA SAMPLE 2ND FLOOR INSIDE WORK AREA, O.R. SUPPLY ROOM	07/10/96	15.18	95	1442.10	24.20	0.006
7958-05	AREA SAMPLE 2ND FLOOR OUTSIDE WORK AREA AT O.R. SUPPLY ROOM ENTRANCE	07/10/96	15.18	98	1487.64	19.11	0.005

I certify that the above sample(s) were taken and the fiber counts performed in strict compliance with NIOSH 7400 standards and regulations.

James A. Weltz, CIH

Laboratory Quality Control Data
Relative Standard Deviations
Intralab: L.0.23 M. 0.15 H.0.12
Interlab: L. M. H.

Masters\PCMAIR.LOG

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3370 Progress Drive, Suite J
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RESULTS OF ENVIRONMENTAL MONITORING - ASBESTOS
Phase Contrast Microscopy - NIOSH Method 7400A

Client Name: Abington Hospital

Project Number: 960408

Site Location: 1200 Old York Rd., Abington, Pa.- Highland Bldg. Fl.2 Old O.R.

Sample Number	Sample Location	Date Sampled	Flow Rate L/Min.	Time Min	Sample Vol. Liters	Fiber Density Fibers/Sq.MM	Fiber Concentration Fibers/CC
7958-06	POST-TEST BASEMENT O.R. MECH ROOM, UPPER LEVEL IN SHAFT	07/10/96	15.18	90	1366.20	9.55	0.003
7958-07	POST-TEST BASEMENT O.R. MECH ROOM UPPER LEVEL IN SHAFT	07/10/96	15.18	90	1366.20	12.74	0.004

I certify that the above sample(s) were taken and the fiber counts performed in strict compliance with NIOSH 7400 standards and regulations.

James A. Weltz, CIH

Laboratory Quality Control Data
Relative Standard Deviations
Intralab: L.0.23 M. 0.15 H.0.12
Interlab: L. M. H.

Masters\PCMAIR.LOG

Criterion Laboratories, Inc.
Daily Workers Attendance Log

Account: Abington Hospital

Project: 960408. **Date:** 7-96-96

Site Address: 1200 Old York Rd
Abington PA 19001
2nd Floor old O.R.

Name	License #	Expiration Date
John Jordan	012449	2-1-97
Jesse Hughes	001472	9/19/96
SR ~~Todd Tyrone Anderson~~ O		~~8-18-96~~
Joe Mahoney	001477	5-18-97
Jim Sweeny	008815	6-1-97
Carl DeRenzis	001467	3-19-97
Bruce MacDonald	007489	3-16-97
TYRONE ANDERSON	009102	8-18-96
SR ~~Carl DeRenzis~~	~~001467~~	~~3-19-97~~ SR